UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JOHN WAYNE JENNINGS, Plaintiff, v. KARL F. SLOAN, et al., Defendants.	NO: 2:15-CV-0010-TOR ORDER ADOPTING REPORT AND RECOMMENDATION IN PART AND GRANTING OPPORTUNITY TO FILE SECOND AMENDED COMPLAINT OR TO VOLUNTARILY DISMISS

BEFORE THE COURT is a Report and Recommendation to dismiss this action for failure to state a claim upon which relief may be granted (ECF No. 9). On March 25, 2015, Plaintiff was granted the opportunity to amend his complaint (ECF No. 7). When Plaintiff did not amend or voluntarily dismiss, Magistrate Judge Rodgers recommended dismissal on May 28, 2015.

Rather than filing objections, Plaintiff submitted a First Amended Complaint (ECF No. 10) on June 10, 2015. Because Plaintiff is proceeding *pro se* the Court will liberally construe this document as his "objections" to the Report and Recommendation. After reviewing Plaintiff's submissions, however, the Court

finds that he has failed to articulate any basis to reject the Report and Recommendation. In addition, the Court finds that the First Amended Complaint fails to state a claim upon which relief may be granted.

For the reasons set forth by Magistrate Judge Rodgers, **IT IS ORDERED** that the Report and Recommendation (ECF No. 9) is **ADOPTED in part** and the initial complaint (ECF No. 6) is **DISMISSED**. However, because of Plaintiff's *pro se* status, the Court will liberally grant him the opportunity to file a Second Amended Complaint to cure the deficiencies of the First Amended Complaint set forth below. Failure to do so will result in the dismissal of this action for failure to state a claim. This may affect Plaintiff's future ability to proceed *in forma pauperis* under 28 U.S.C. § 1915(g). In the alternative, Plaintiff may file a motion to voluntarily dismiss.

FIRST AMENDED COMPLAINT

The First Amended Complaint, consisting of 30 pages, omits State of Washington and Okanogan County as Defendants and adds nine Sheriff's Deputies. As a general rule, "an amended complaint supersedes the original complaint and renders it without legal effect." *Lacey v. Maricopa County*, 693 F.3d 896, 927 (9th Cir. 2012). Therefore, "[a]ll causes of action alleged in an original complaint which are not alleged in an amended complaint are waived." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) citing to *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th

Cir. 1981), overruled in part by *Lacey*, 693 F.3d at 928 (any claims voluntarily dismissed are considered to be waived if not repled). Furthermore, Defendants not named in an amended complaint are no longer defendants in the action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Therefore, the Defendants State of Washington and Okanogan County have been terminated from this action and Defendants Dave Rodriguez, Noah Stewart, Bob Heyen, Kreg Sloan, Debbie Behymer, Terry Shrable, Isaiah Holloway, Mitzie Green, and Eric Mudgett have been added.

EXHAUSTION

Plaintiff indicates that he did not file any grievances concerning the facts in his complaint because when he attempted to obtain a grievance form, an unidentified officer would not give him the form. He does not state when this occurred. Because there are multiple claims alleged in the First Amended Complaint, occurring in and out of the Okanogan County Jail, it is unclear for which incident Plaintiff sought a grievance form.

A prisoner may not bring a lawsuit with respect to prison conditions under § 1983 unless all available administrative remedies have been exhausted. 42 U.S.C. § 1997e(a); *Vaden v. Summerhill*, 449 F.3d 1047, 1050 (9th Cir. 2006); *Brown v. Valoff*, 422 F.3d 926, 934-35 (9th Cir. 2005). Exhaustion is required for all suits about prison life, *Porter v. Nussle*, 534 U.S. 516, 523 (2002), regardless of the type

of relief offered through the administrative process, *Booth v. Churner*, 532 U.S. 731, 741 (2001). A prisoner must complete the administrative review process in accordance with the applicable rules. *Woodford v. Ngo*, 548 U.S. 81, 92 (2006). Under *Woodford*, there must be proper exhaustion, which means following the steps set out in the grievance procedure. *Id.*

Plaintiff should note that a failure to exhaust any available administrative remedies would be cause for dismissal of the action. Exhaustion must precede the filing of the complaint and compliance with the statute is not achieved by satisfying the exhaustion requirement during the course of an action. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002).

SECTION 1983

Section 1983 requires a claimant to prove (1) a person acting under color of state law (2) committed an act that deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988). A person deprives another "of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that "causes" the deprivation of which [the plaintiff complains]." *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1439 (9th Cir. 1991)

(brackets in the original), *abrogated in part on other grounds*, *Farmer v. Brennan*, 511 U.S. 825 (1994); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

A complaint must set forth the specific facts upon which the plaintiff relies in claiming the liability of each defendant. *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). Even a liberal interpretation of a civil rights complaint may not supply essential elements of a claim that the plaintiff failed to plead. *Id*. at 268. To establish liability pursuant to § 1983, Plaintiff must set forth facts demonstrating how each Defendant caused or personally participated in causing a deprivation of Plaintiff's protected rights. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Plaintiff has made no allegations against Karl F. Sloan, Frank T. Rogers, Eric Mudgett, Noah Stewart, Isaiah Holloway, Terry Shrable, Dave Rodriguez or Kreg Sloan in his First Amended Complaint. Therefore, Plaintiff's complaint against each of these Defendants is subject to dismissal.

EXHIBITS

Exhibits should not be submitted with a complaint. Instead, the relevant information contained in an exhibit should be paraphrased in the complaint. Plaintiff should keep his exhibits to use to support or oppose a motion for summary judgment or a motion to dismiss, or for use at trial.

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PLAINTIFF'S ALLEGATIONS

The allegations in Plaintiff's First Amended Complaint seem to fall into three different categories: (1) a murder investigation; (2) Plaintiff's initial placement at the jail; and (3) an assault at the jail.

MURDER INVESTIGATION

Plaintiff asserts that Defendants, Detectives Rob Heyen and Deborah Behymer, investigated the murder of a man whose body was found across the road from Plaintiff's residence on Labor Day, Monday, September 1, 2013.[1] Plaintiff states that Defendant Heyen took his statement, and advised him that he could return home. Apparently, Plaintiff was offered a ride with a deputy if he did not have transportation.

Plaintiff states that Defendant Behymer obtained a search warrant for his house and outbuildings. Plaintiff indicates that he was arrested on November 18, 2013. Documents attached to the First Amended Complaint show that the arrest was pursuant to a warrant. Plaintiff states that Defendant Heyen obtained a warrant to search his house and outbuilding following the arrest.

[1] The Court takes judicial notice of the fact that in 2013, Labor Day fell on Monday, September 2, 2013. Statements to the contrary are likely typographical errors.

Plaintiff has alleged no facts from which the Court could infer that Defendants Behymer or Heyen violated his constitutionally protected rights in the manner in which they obtained or executed warrants, or in the taking of Plaintiff's statement. Plaintiff presents no facts showing Defendants sought a warrant unsupported by probable cause or exceeded the scope of any warrant in its execution. Plaintiff does not claim that he has been exonerated of the criminal charges brought against him. The facts presented do not "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

JAIL CONDITIONS IN NOVEMBER/DECEMBER 2013

Plaintiff asserts that three days after he was booked into jail, he was seen by unidentified medical staff on November 21, 2013. He avers that he told them he needed his "oxygen concentrater [sic]" and CPAP machine. He claims that Defendant Mitzie Green, a Corrections Officer, handed him a document that appeared to be an affidavit and told him that he would have to sign it to get the machine. Plaintiff states that he was instructed not to "fill it out or date it." He does not state that he signed the document.

Plaintiff then asserts he was taken to a hospital Emergency Room on December 13, 2013, as he was suffering from severe dehydration, extreme exhaustion and stroke. He avers that his lawyers brought "the machines" to the jail that afternoon. He states that he was moved to the medical cellblock on December

23, 2013, so that he could have use of his machines. He complains that another inmate in the medical cellblock claimed to have machines "that the jail bought [] for him," for four of the six weeks he had been incarcerated.

Pretrial detainees may prosecute an action for deliberate indifference to their medical needs under the Fourteenth Amendment Due Process clause. *See Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1242–44 (9th Cir. 2010). The legal standards that apply to a deliberate indifference claim prosecuted by a pretrial detainee are the same as those that apply to prisoners under the Eighth Amendment. *Id.* at 1244.

Under the Eighth Amendment standard, a prisoner seeking to impose liability for deliberate indifference must demonstrate three elements: (1) a "serious medical need," such that "failure to treat [the] condition could result in further significant injury or the unnecessary and wanton infliction of pain," *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal quotation marks omitted); (2) Defendant was "aware of" that serious medical need, *see Farmer v. Brennan*, 511 U.S. 825, 837 (1994); and (3) Defendant disregarded the risk that need posed, *see id.* at 846, such as by denying or delaying care, *see Snow v. McDaniel*, 681 F.3d 978, 986 (9th Cir. 2012) *overruled in part by Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014); *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002). Plaintiff alleges that Defendant Green, a Correctional Officer, told him to sign a document in order to

receive his "machines." This allegation alone is insufficient to state a Fourteenth Amendment claim of deliberate indifference.

Plaintiff admits that he received emergency medical treatment for dehydration, exhaustion and stroke in December 2013, and that he was accommodated in the use of his "machines" after they were brought to the jail. Plaintiff has failed to state a claim against Defendant Green upon which relief may be granted.

ASSAULT BY ANOTHER INMATE

Plaintiff complains that on February 9, 2014, another inmate assaulted him, beating his head against a cement block wall more than 25 times. Plaintiff claims that he received no treatment for his head injury. While such allegations are disturbing, Plaintiff has presented no facts from which the Court could infer that named Defendants were actually aware of the danger the other inmate posed to Plaintiff or aware of the resulting head injury.

Insufficient protection of a prisoner resulting in harm inflicted by other inmates may violate a prisoner's constitutional rights. *See White v. Roper*, 901 F.2d 1501, 1403-04 (9th Cir. 1990). When a prisoner is claiming that he has not been afforded adequate protection against violent acts by other inmates, the prisoner must show that the prison officials' acts were deliberately indifferent to the prisoner's vulnerability. *Wilson v. Seiter*, 501 U.S. 294 (1991).

A prisoner may establish a § 1983 claim under the Eighth and Fourteenth Amendments against prison officials when the officials acted with deliberate indifference to the threat of serious harm or injury by another prisoner. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986). Under the deliberate indifference standard, a plaintiff must demonstrate that prison officials knew that he faced a substantial risk of serious harm and that they disregarded that risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. at 847.

Plaintiff has failed to present any facts from which the Court could infer that any named Defendant knew that Plaintiff faced a substantial risk of serious harm from another inmate. Based on Plaintiff's exhibits, it appears likely the other inmate was prosecuted for the assault. ECF No. 10 at 27.

In addition, Plaintiff presented no facts showing any named Defendant knew that Plaintiff had been injured or the extent of his injuries, and still refused to provide treatment. Plaintiff does not state when he was denied necessary medical attention, by whom or any facts from which the Court could infer deliberate indifference to Plaintiff's serious medical needs.

SECOND OPPORTUNITY TO AMEND OR VOLUNTARILY DISMISS

The Court will grant Plaintiff a second and final opportunity to amend his complaint to correct the deficiencies set forth above. *See Lopez v. Smith*, 203 F.3d

1122, 1130–31 (9th Cir. 2000) (en banc). Plaintiff may submit a Second Amended Complaint within **thirty (30) days** of the date of this Order which includes sufficient facts to establish federal subject-matter jurisdiction. *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citations omitted). To do so, Plaintiff must show persons acting under color of state law violated his constitutionally protected rights.

Plaintiff's amended complaint shall consist of a **short** and **plain** statement showing he is entitled to relief. Plaintiff shall allege with specificity the following:

(1) the names of the persons who caused or personally participated in causing the alleged deprivation of his constitutional rights,

(2) the dates on which the conduct of each Defendant allegedly took place, and

(3) the specific conduct or action Plaintiff alleges is unconstitutional.

Furthermore, Plaintiff shall set forth his factual allegations in separate numbered paragraphs. THIS SECOND AMENDED COMPLAINT WILL OPERATE AS A COMPLETE SUBSTITUTE FOR (RATHER THAN A MERE SUPPLEMENT TO) THE INITIAL AND FIRST AMENDED COMPLAINTS. Plaintiff shall present his complaint on the form provided by the Court as required by LR 10.1(i), Local Rules for the Eastern District of Washington. The Second Amended Complaint must be legibly rewritten or retyped in its entirety, it should be an original and not a copy, it may not incorporate any part of the original complaint by reference, and **IT MUST**

BE CLEARLY LABELED THE "SECOND AMENDED COMPLAINT" and cause number 2:15-CV-0010-TOR must be written in the caption.

PLAINTIFF IS CAUTIONED THAT IF HE FAILS TO AMEND WITHIN 30 DAYS AS DIRECTED, THE COURT WILL DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner, who brings three or more civil actions or appeals which are dismissed on grounds they are legally frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil action or appeal *in forma pauperis* "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

If Plaintiff chooses to amend his complaint and the Court finds the Second Amended Complaint is frivolous, malicious, or fails to state a claim, the amended complaint will be dismissed pursuant to 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2). Such a dismissal would count as one of the dismissals under 28 U.S.C. § 1915(g).

Alternatively, the Court will permit Plaintiff to voluntarily dismiss his Complaint pursuant to Rule 41(a), Federal Rules of Civil Procedure. Plaintiff may submit the attached Motion to Voluntarily Dismiss the Complaint within **thirty (30) days** of the date of this Order or risk dismissal under 28 U.S.C. §§ 1915A(b)(1) and

1915(e)(2), and a "strike" under 28 U.S.C. § 1915(g). A voluntary dismissal within this 30 day period will not count as a strike.

Plaintiff is still obligated to pay the full filing fee of $350.00. *See* ECF No. 5. However, if Plaintiff elects to take a voluntary dismissal within the 30 day period, Plaintiff may simultaneously file a separate Affidavit and Motion to waive collection of the remaining balance of the filing fee in this action. The Court will grant such a motion only for good cause shown. In no event will prior partial payments be refunded to Plaintiff.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward a copy to Plaintiff, along with a form Motion to Voluntarily Dismiss Complaint, **and a civil rights complaint form.**

DATED July 10, 2015.

THOMAS O. RICE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN WAYNE JENNINGS, Plaintiff, vs. KARL F. SLOAN, FRANK T. ROGERS, DAVE RODRIGUEZ, NOAH STEWART, BOB HEYEN, KREG SLOAN, DEBBIE BEHYMER, TERRY SHRABLE, ISAIAH HOLLOWAY, MITZIE GREEN, and ERIC MUDGETT, Defendants.	NO: 2:15-cv-00010-JTR MOTION TO VOLUNTARILY DISMISS COMPLAINT

Plaintiff JOHN WAYNE JENNINGS requests the court grant his Motion to Voluntarily Dismiss the Complaint pursuant to Rule 41(a), Federal Rules of Civil Procedure. Plaintiff is proceeding *pro se*; Defendants have not been served in this action.

DATED this_____day of _____ 2015.

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JOHN WAYNE JENNINGS